DOCUMENT RESUME

ED 443 316 HE 033 071

| | |
|---|---|
| AUTHOR | Diotalevi, Robert N. |
| TITLE | Copyright Dot Com: The Digital Millennium in Copyright. |
| PUB DATE | 1999-00-00 |
| NOTE | 29p. |
| PUB TYPE | Guides - Non-Classroom (055) -- Reports - Descriptive (141) |
| EDRS PRICE | MF01/PC02 Plus Postage. |
| DESCRIPTORS | Distance Education; Downloading; *Fair Use (Copyrights); Federal Legislation; Higher Education; *Internet; Legal Responsibility; World Wide Web |
| IDENTIFIERS | *Copyright Compliance; *Digital Millennium Copyright Act 1998 |

ABSTRACT

This paper examines copyright issues vital to education. It explores copyright in terms of both statutory and case law, and in particular in relation to the Digital Millennium Copyright Act (DMCA), which is a complex set of rules and regulations that affects anyone involved in copyright. Among the new issues are the impact of technology and the Internet on copyright law. The first section of this report examines the basics of copyright, defining such terms as originality, expressions and fixation, ownership, registration, and duration, and discusses the fair use doctrine. The next section examines issues related to technology, including Web-related issues and permission. The third section explores the Act, covering implied license, institutional service providers, and criminal consequences and liability. References to cases and examples are given throughout the text. A concluding section suggests that if educators are to advance in the digital age, they must compromise between right and rule and between freethinking and structured regulation. An appendix provides a list of university Web sites dealing with copyright issues. (Contains 58 case references.) (SM)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 443 316

# Copyright Dot Com: The Digital Millennium in Copyright

***Dr. Robert N. Diotalevi, Esq., LL.M.****
**Director of Legal Studies**
**The College of West Virginia**
***An Affiliate of West Virginia University***
**Beckley, WV**

## INTRODUCTION

Copyright law ultimately affects anyone interested in higher education. The age of information has given rise to greater concerns about copyright legalities. Congress is continually passing new laws. The latest Clinton Administration measure, The Digital Millennium Copyright Act, is a massive complexity of rules and regulations. It will probably serve as a challenge for copyright aficionados, service providers and all involved in the field for some time to come.

Courts are constantly being asked to interpret new law. Many thorny matters are at the forefront of much debate and controversy. Among them is the Internet's role in copyright. Once a research project, the Net is our largest computer system. This Information Super Highway offers a variety of useful information as one navigates down its maze of URL's, browsers and hyperlinks. But advanced technology brings about additional concerns for educators as to how copyright will be affected by it.

There are many areas to explore in copyright in light of statutory law and case law in the new millennium. This work will provide an overview of the subject, address new legislative measures and provide guidance regarding distance education matters for the cyberspace professional.

BEST COPY AVAILABLE

## I. THE LAW OF COPYRIGHT



U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☒ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL HAS BEEN GRANTED BY
R. DIOTALEVI
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

HE 033071

## A. The Basics

### 1. Overview

Copyright law is at the heart of everything we do as educators. This has never been more evident than with the emergence of the Internet as a teaching tool. The Internet was once a research project. Today it is the greatest computer system in the world. Also known as the *Net* or *cyberspace*,[1] this information super highway offers a tremendous amount of material. The information age has created greater concerns about copyright law. Heading into a new millennium, fundamental areas so vital to educators, business people, computer professionals need to be addressed before traveling too far into our future.

### 2. Myths of Copyright

There are many misconceptions about copyright law. For example, many believe that one needs to provide notice in order to possess a copyrighted work.[2] Some think that registration is necessary or that photocopying requires express permission from the author in all cases. Also, mistakes abound as to the defense of copyrights as well as thoughts of the dreaded "copyright police" coming to arrest against alleged infringement violations.[3] Copyright law is simply misunderstood.

There is no physicality to copyright protection. A copyright is a type of intellectual property, that is, an attachment of intangible rights occurs when certain rules are followed. It is reminiscent of our federal or state constitutional protections. For example, even though a constitution could burn in a fire we would not lose the fundamental freedoms contained therein. A closer examination reveals that there are several privileges afforded by copyright law.

### 3. What is a copyright?

There are numerous authors who have addressed this subject.[4] The reason is that copyright has been around for most of our country's existence. In fact, the fundamental basis of copyright law stems from the United States Constitution. In Article 1, Section 8, clause 8 we find that the founding fathers wished to promote science and the useful arts by securing an exclusive right to writings. Unfortunately, the fathers did not explain themselves. Perhaps the most important statute in the area of copyright is the Copyright Act of 1976 (The Copyright Act).[5] It provides the basic framework for all of our present statutes.

Section 106 of the Copyright Act provides the owner of a copyright certain exclusive rights. In general they include five safeguards:



1) Reproduction of the copyrighted work

2) Preparation of derivative works (adaptations) based upon the copyrighted material

3) Distribution of the work

4) Performance of the work publicly

5) Displaying of the work publicly[6]

Copyright is a legal device. One must carefully examine several factors in order to determine whether or not copyright law is applicable. Note that copyright law, for the most part, is federal in nature. The laws of other countries must be respected.[7] This work will primarily address the laws of the United States while making reference to certain treaties and related concepts.

**4. Originality**

A major requirement in copyright law is that the work be original in order to have copyright protection.[8] It must be independently conceived by its creator. However the test is not one of newness. For example, assume a teacher in Orlando writes an article called "Understanding Copyright Law." Another teacher in Omaha has just completed a very similar article with the same name. Neither knows of the other's efforts. Both instructors have created an original work; hence copyright protection is afforded to each of them. Courts would of course look very closely at works that seem to mirror others or outright copy them verbatim as the likelihood of violation is more clear in these circumstances.

**5. Expressions and Fixation**

A key factor is expression. All authors, including those online, must be aware that copyright law affords protection to *expressions* rather than ideas.[9] Examples of copyrightable material include original, tangible forms of poetry, literature, motion pictures, sound recordings, computer programming, music, videos, plays, photographs, drawings and the like. The work also needs to be *fixed.* It is so when its embodiment:

> is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission. [10]



Just about any form of original expression qualifies as a tangible medium. This includes a computer's random access memory (RAM) as well as notes hurriedly penned upon the back of a table napkin. When dealing with cyberspace we need to address a multitude of items (such as downloading or copying onto discs and hard drives, etc.). Care must be taken to avoid activities that may constitute a violation of fixed, tangible expressions covered by copyright law.[11] These would include copying and/or using someone's work outright but the problem is that copyright

takes so many different forms. For example it is arguable that downloading constitutes copying and may very well be an infringement in itself. Also, the faxing of a document qualifies as copying. However, most also agree that mere transmission is not fixation.[12] Case law is sparse in these areas. Nevertheless one thing is certain: The Internet will provide many issues for courts to decide as a result of our advancing technological capabilities.[13]

**6. Formalities**
**a. Ownership, Registration and Duration**

Ownership rights attach whenever one's expression is fixed in a tangible medium. No other action is necessary to obtain such privileges. Thus, usually the people who create the expression own the copyright thereto, but there are exceptions. For example, if an employee in the course of his or her employment does such a work, the employer owns the copyright of it. Or, if the creator sells the copyright it becomes the property of the business or person who purchases it. Faculty should be careful in reading contracts as well as faculty handbook language that may be incorporated by reference into contractual agreements regarding copyright ownership. There is no controlling case law in this area in light of recent legislation.

It is surprising to most that no major protocol exists to obtain copyright protection. It is no longer necessary to provide notice (*see infra).* Registration, however, is advisable. This is the process by which one informs the U.S. Copyright Office of copyright ownership. The Copyright Office provides simple forms.[14] All that is necessary are filing out the paperwork, a twenty-dollar fee and a copy of your expression. Registration assists in protecting one's rights, enjoining others and obtaining statutory and civil remedies. In fact, registration is required in order to bring an infringement suit.

Regarding the length of time that copyright protection lasts on one's work, it normally runs for an artist's lifetime plus fifty years. This year President Clinton signed a measure extending the term an additional twenty years. [15]

**b. Notice**

Most are familiar with the old copyright notification symbols. They usually contain a *C* in a circular symbol, or the actual word copyright, with the date and name of the owner.

*Example:*

---

*Copyright (or ©) 1997 Bill Kane*



In March, 1989 the United States joined the Berne Convention for the Protection of Literary and Artistic Works.[16] This multinational treaty provides mutual protection and makes notice symbols obsolete. By joining Berne the United States and member nations recognize and respect each other's laws at least minimally. Again there are advocates of the *notice can't hurt* rule. It is a possible way of avoiding trouble, but it remains an optional tool at best.

## B. The Fair Use Doctrine

There are several defenses available for those who have allegedly violated copyright. Among these defenses are:

- The work is in the public domain. For example, federal documents are not afforded the protections of copyright law.
- The copyright may be expired, or the holder may have forfeited his or her rights in the work.
- The copyright holder may have granted another permission to use the product.

Fair use[17] is also an exception to normal copyright legalities. It allows, in a limited manner, use of copyrighted protected materials in items for purposes of parody, news reports, comedic acts, research and education. The law considers four (4) factors in determining if fair use is applicable as a defense. They are:

> 1) the *purpose and character* of the use, including whether use is of a commercial nature or is for nonprofit educational purposes,
>
> 2) the *nature* of the copyrighted work,
>
> 3) the *amount and substantiality* of the *portion used* in relation to the copyrighted work as a whole and
>
> 4) the *effect* of the use *upon the potential market* for or value of the copyrighted work[18]

Fair use is on a case by case basis. The case of Campbell v. Acuff-Rose Music, Inc.[19] demonstrates this. The Supreme Court reversed the Sixth Circuit Court, claiming that it erred in finding copyright infringement against 2 Live Crew. The petitioners were band members Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs. The group parodied Roy Orbison's "Oh, Pretty Woman" in a song Campbell entitled "Pretty Woman." After nearly a quarter of a million copies of the recording had been sold, Acuff Rose sued 2 Live Crew and its record company, Luke Skywalker Records.



The Supreme Court applied the four-factor test summarized as follows:

> (1) The purpose and character of the use was a parody,
>
> (2) The nature of the copyrighted song does not prevent commercial use of a parody,
>
> (3) The portion used was only the necessary amount,

as no more of the lyrics were taken than was necessary in relation to the parodic purpose, and

(4) The parody was unlikely to have a large effect on the marketplace[20]

The major problem with fair use is that few courts have addressed academic concerns. And, the latest Clinton administration bill does not clear up this matter either (*see infra*).

### 1. Confusing the Issue with *CONFU*

In October 1996 The Working Group on Intellectual Property Rights in the Electronic Environment under the Clinton Administration proposed guidelines under CONFU, The Conference on Fair Use. CONFU was initiated in September 1994 and ended May 1997. The U.S. Patent & Trademark Office hosted the event. Informal talks regarding over twenty topics of interest occurred. No proposals, however, garnered any strong support by participants. CONFU's objective, among others, was to cover fair use in educational settings regarding electronic materials.[21]

CONFU offered no guidance concerning online course materials. This subject matter is so new to our legal system that CONFU hardly even addressed it. Instead, CONFU participants decided to let present fair use standards as interpreted by the courts dictate most educational situations. Thus, the problem with CONFU is that it left distance teachers without a clear online strategy.

#### 2. Fair Use Today

Fair use is still somewhat convoluted. It is unclear as to what constitutes fair use. This is especially true with the passage of the Digital Millennium Copyright Act (*see* IIIB, *infra*). Also complicating the matter are new and challenging digital advancements. Section 110(1) of the Copyright Act permits most face-to-face uses. However, copyright holders have exclusive rights to public display and public performance of their works. We glean some common classroom allowed and disallowed activities from our current statutes as well as recent case law:



**Fig. I**

| PERMISSIBLE USES | IMPERMISSIBLE USES |
|---|---|
| Unlimited displaying of charts, graphs or photographs, including stills of motion pictures (distance education included) | Dramatic performances of musicals or literary works |
| Unlimited, non-dramatic performances of music or literature (i.e. reading novel excerpts, musical lines, etc.) | Out-of-print-book (placement on Web) |
| Copying out-of-print-books | Textbook photocopying and placement on Web (even if password or pin provided) |

| | |
|---|---|
| Journal article posted to Web page (restricted access, students and faculty) | Copying of book & placement on reserve in library |
| Placement of book on reserve in library | Copying videotape for classroom instruction and/or charging fees |
| Showing videotape for classroom instruction | Copying coursepacks for class distribution without meeting fair use criteria for each material used |
| Broadcast or rebroadcast of classroom presentation to home or office (including the showing of another's video if permission is obtained) | |
| Videotaping of classroom (teacher's or student's presentation) | |
| Text, video, audio, and/or photographs used in telecourse for enrolled students | |
| Telecourse via cable television if institution - controlled audience (i.e. student body) | |
| Remote access of searchable database via The Internet if institution-controlled audience | |
| Student project placed on The Internet with restricted access to other students | |
| Use of commercial, instructional videotape on cable television or two-way interactive video | |
| Use of commercial, instructional videotape on cable television or two-way interactive video (via Internet, access restricted) | |
| Taping on air television program to be shown on cable television or via two-way interactive video (remote sites allowed to record class to avoid possible technical difficulties) | |



There are several cases of note which provide guidance regarding instructional purposes even though they do not directly deal with education. For example, in 1991 the court in Basic Books, Inc. v. Kinko's Graphic Corp.[22] held that a commercial copyshop that copied coursepacks was not entitled to the right of fair use. A similar ruling occurred in 1996 with Princeton University Press v. Michigan Document Services.[23] It is interesting to note that one of the three dissents favored the making of multiple copies by professors in classroom situations. The court did not address the issue.[24] The United States Supreme Court has not addressed this matter either.

To add to the confusion, The Digital Millennium Copyright Act, *infra* at IIIB, does not give us clear guidance as to several issues concerning downloading, posting, website linkage, etc. Future court decisions as well as study by Congress under the guidelines of The Digital Millennium Copyright Act will be needed to address these matters.

## II. TECHNOLOGY...UNWEAVING THE TANGLED WEB

### A. Overview

There is little if any judicial guidance in this area so important to educators. Most case law deals with corporate liability regarding copyright infringement such as the *NetCom* case *(see* 3A, *infra).* Some scholars claim that The Internet has provided a type of escape from copyright legalities. In other words, with the emergence of innovative ways of communicating such law is not applicable to the information highway and the statutes and cases are too archaic. This argument has had little effect upon Congress in the consideration of laws. Nor have many in the field given it much if any validity.

### B. Distance Learning

Distance learning refers to the delivery of educational materials that occurs when course instruction is in a non-traditional setting.[25] Examples include audio, video, motion picture, cable television, microwave and, of course, the Internet. Section 107 of the Copyright Act governs educational performances and displays of works. But, performing and transmitting of information are different. Fair use is not helpful and CONFU seems to be silent. Thus, adoption of some solid guidance is in order to give direction in these gray areas.

#### 1. Concerns for the Digital Millennium Educator: Institutional Policies and Procedures

Several institutions have addressed copyright law by implementing measures via hard copy or the Internet.[26] Colleges and universities offer subjects on such intellectual property matters. At The College of West Virginia (CWV) we recently included two Internet courses, entitled *Copyright Law* and *The Law of Cyberspace* into our curricula. At conferences nationwide educators have expressed the need for institutions to provide offerings in these areas. There are many excellent



resources available to those not familiar with these issues. We recommend the sites listed in *Appendix A.* The most complete resource I have found is "The Regents Guide to Understanding Copyright and Educational Fair Use" by **The University of Georgia**, State Copyright Regents Committee's Office of Legal Affairs. (accessed Feb. 17, 1999) <http://www.peachnet.edu/admin/legal/copyright/copy.html>.
It covers topical areas as research, writing, multimedia projects, video/sound recordings, and so on. It does so by a series of questions and answers dealing with everything from unpublished letters to out-of-print books. The site contains wonderful scenarios such as professors who scan articles from copyrighted journals and add them to their web pages, the showing of copyrighted motion pictures for instructional purposes, copying videotapes for classroom instruction, the creation of telecourses utilizing copyrighted materials, etc. And, it gives a good general overview of copyright law. Also, The Copyright Clearance Center has a free handout entitled "Guidelines for Creating a Policy for Copyright Compliance." It can be found at <http://www.copyright.com>.

**3. Web-related Issues**

Concerns exist as to linking to a web site without permission. Such linkage probably would be beneficial to businesses. In other words, the mere provision of access to another's site, as long as no one directly steals, gives credibility and free advertising to the company providing the site. People would be telling others of the organization free of charge. More importantly, there are other issues involving cyberspace that need to be examined.

Most scholars feel that the clear-cut issues will remain the same. In other words, treatment of material on the Web is similar to that of literature. While information on the Web maybe protected, it should be noted that copyright protection does not extend to computer systems, processes and the like. Thus, the copyright protections do not cover machinery. Clearly actions such as browsing, e-mailing and related practices seem free of major problems.[27] Section 110 of The Copyright Act addresses copyrighted works regarding distance education, however, the language of the statute is quite befuddling and needs to be examined carefully. Section 110(2) allows for the "transmission" of a performance or display, but only within defined limits. The code hereby defines "transmit" to mean communicating a performance or display "by any device or process whereby images or sounds are received beyond the place from which they are sent." Note that Section 110(2) allows displays of nearly all works, but it confines the allowed performance to a nondramatic literary or musical works. Thus, a professor may read a book concerning The Titanic aloud, but showing the movie of the same name is quite another matter. When passed in 1976 Section 110(2) involved only television technology. The waters get even murkier when information is sent via the Internet through multiple transmissions.

**B. The NetCom Case**

In the case of *Religious Technology Center v. Netcom On-Line Communications Services Inc.*,[28](hereinafter referred to as NetCom), Netcom found itself ensnarled in a copyright infringement suit. The case centers upon a former Church of Scientology minister, Dennis Erlich. He copied some of the works of L. Ron Hubbard. Erlich then placed them on Usenet. Erlich accessed Usenet via a Bulletin Board Service (BBS). Netcom provided linkage. Plaintiffs Religious



Technology Center and Bridge Publications, Inc., sued Erlich as well as the BBS operator, Klemesrud, and the Internet access provider, Netcom. The plaintiffs had informed both Klemesrud

and NetCom of the infringement, but they contended that it would be impossible to prescreen Erlich's postings. Furthermore, NetCom stated that removing Erlich from the Internet would mean affecting hundreds of users of Klemesrud's BBS. The case turned on the NetCom's potential liability.

Traditionally, as seen in Playboy Enterprises, Inc. v. Frena, [29] copyright infringement has been a "strict liability" offense, i.e., the infringer may be liable for the illegal act even if he neither knew nor had reason to know of it. The plaintiff sued Netcom on three liability theories: direct, vicarious and contributory. The court held that direct liability was inapplicable in that Netcom did not engage in any action that caused a direct violation of copyright law. The company merely

created a copy for a third party. The postings resulted in the creation of copies on Netcom's storage devices, but the creation of the copies as well as the distribution and display of them was done without any volitional act.[30]

On the issue of vicarious liability the court also stated that plaintiff failed to prove defendant had the requisite control over the infringer's actions sufficient to show any gain from its action.[31] However, on the issue of contributory liability the court held there existed evidence that presented a question of fact as to whether Netcom had knowledge and failed to take appropriate action.[32] The plaintiff informed Netcom of the infringement. The Court held that failure to take said action equates to substantial participation in these instances resulting in potential liability for the storage of data.[33] The Court stated that Erlich had infringed, but the case regarding NetCom was ultimately settled out of court in 1996.[34]

A link or URL (Uniform Resource Locator) is a destination obviously not copyrightable since it does not represent an expression that is fixed in nature. There is the issue of the accessing of web pages. The problem arises when one saves a page to the hard drive. This action constitutes the making of a copy so copyright law is applicable. The crux of the matter is whether or not there is wrongful reproduction of a fixed expression so as to violate the law. There are those who contend that public domain or fair use standards apply in these instances. Again, the courts will have to deal with this subject matter in the near future. Congress is in the process of studying such matters. The law here is quite unclear.

**B. Permission: The Rule of the Day**

Since copyright law is a bit murky when it comes to issues involving teaching, distance education and the like, obtaining consent is usually in order. It is the best thing to do to ensure legality. For example, whenever materials are being used for commercial or profit purposes, obtaining permission is essential. Most of us forget that educational institutions are here to make money. Organizations charge fees in distance learning. Not only is getting permission proper netiquette but it will save dollars down the road and potential loss of employment for those responsible. When viewing another's work ask the following questions:



1) Does copyright law protect this work?

2) Am I trying to use and copy it for myself as my own work?

3) Does any exception to the law apply? (fair use, etc.).

When in doubt, simply ask permission and, above all, get it in writing.

### C. Legality: Truth or Consequences

Most educators have never been faced with copyright-related lawsuits for good reason: a cause of action is simply too expensive for the plaintiff to pursue. In the past only a few suits have been filed against faculty. However, there are valid reasons for obedience to the law. Universities and colleges bear responsibility of complying with these laws. Most likely they will be the targets of the deep pocket legal action. Even though most unauthorized uses are never litigated, if ever discovered, everyone must be aware of the rules. This is important when it comes to the roles of our employees and teachers of law.

The consequences of copyright violation are housed in an infringement complaint. Along with civil and statutory awards for each violation, criminal penalties could be meted out.[35] In the case of cyberspace, if guidance is not effectively dispatched many will find themselves facing legal liability in the future.[36] Penalties are becoming harsher especially with the passage of The Digital Millennium Copyright Act (discussed *infra*) as well as other bills pending in Congress. (See, e.g., Criminal Consequences and Liability in the Digital Millennium, III B6 of this manuscript).

## III. COPYRIGHT'S FINAL FRONTIER?

### A. Implied License

The theory of implied license has been bantered around cyberspace.[37] The contention is that permission is automatically granted to those setting up a web page. This idea has been asserted particularly by those involved in hypertext linkage. The plain truth is that this seemingly simple solution is not as simple as it looks. There is no legal precedent regarding implied license. The best advice is for all to exercise caution and clearly acknowledge links to other sites in order to avoid liability.[38] This can be achieved by contacting all known owners and/or citing one's sources as completely as possible.



### B. The Digital Millennium Copyright Act (DMCA)

#### 1. Overview

On October 28, 1998 President Clinton signed a bill providing new game rules for the treatment and respecting of online copyrighted material. The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, (hereinafter referred to as The *DMCA*),[39] served as the subject of debate for many interested in copyright law. Both houses of the one hundred and fifth Congress gave it the green light earlier in the month of October.[40] The DMCA adds two new chapters to Title 17 as it strengthens international law worldwide and protects domestic technology. President Clinton released the following statement after passage:

> I am pleased that the Congress has passed the Digital Millennium Copyright Act. This bill will implement the two new landmark World Intellectual Property Organization (WIPO) treaties that my Administration negotiated. These treaties will provide clear international standards for intellectual property protection in the digital environment and protect U.S. copyrighted works, musical performances and sound recordings from international piracy. American copyright-based industries that produce and promote creative and high-technology products contribute more than $60 billion annually to the balance of U.S. trade. This bill will extend intellectual protection into the digital era while preserving fair use and limiting infringement liability for providers of basic communication services....[41]

The one hundred and fifty-page document divides into five titles in ***Fig.II*** below:



**Fig.II**

*Note*: Except for Title I (Treaty), each the following are effective upon enactment:

*Title I*: Implementation of two (2) treaties dealing with digital issues, copyright protection and management systems (The WIPO Copyright Treaty Act and the WIPO Performances and Phonograms Treaty)

*Title II*: Limitation of Online infringement liability for ISPs (Internet Service Providers) (reducing legal uncertainties regarding such items as digital networks, strengthening anti-online piracy,

outlining copyright owners' notification procedures, defining university liability, and creating a "safe harbor" for ISPs in four (4) situational activities):

1. Conduits (provision of materials transmission, routing and connections)

2. System Caching (temporary or intermediate materials storage to improve user performance and reduce congestion)

3. User Storage (materials storage on systems or networks at the direction of users)

4. Information Locators (linkage tools by service providers such as directories, pointers and/or hyperlinks to facilitate material access)

*Note*: 1 and 2: transmission must be initiated by a third party.
3 and 4: requires the ISP to be without knowledge or having reason to know of any infringement, to obtain no direct financial benefit and to not change the materials.

*Title III*: "The Computer Maintenance Competition Assurance Act" (formerly H.R. 72) (creation of an exception for temporary computer program reproduction in maintenance/repair).

*Title IV*: "Miscellaneous Provisions" (distance education, exemption for libraries/archives, ephemeral (momentary) recordings).

*Title V*: "The Vessel Hull Design Protection Act" (formerly H.R. 2696) (creation of new, sui generis protections for boat hull designs, in a new Chapter entitled Chapter 13 of Title 17 of the U.S. Code, effective for two years).[42]



**2. The DMCA in Depth**

Specifically, the Digital Millennium Copyright Act:

(1) Limits copyright infringement liability for Internet Service Providers (ISP's) for the mere transmission of information as a conduit or transient host, provided no knowledge or financial gain is present,

(2) Establishes guidelines for the removal by ISP's of material from the Internet that appears to be an infringement upon the knowledge by the ISP,

(3) Limits liability against institutions when faculty members use educational facilities in order to publish materials electronically,

(4) Makes criminal the circumvention of anti-piracy devices, also known as "little black boxes,"

(5) Outlaws code-cracking devices but not ones being employed for research, testing, law enforcement activities and related legal means,

(6) States that the fair use doctrine remains a *viable defense* in copyright infringement matters, but does not go into much detail,

(7) Updates the library exemption for facilities to take advantage of digital technology while engaging in activities similar to those for non-digital methodologies,

(8) Directs The Register of Copyright to consult with educators, copyright owners and libraries, and to submit recommendations for the promotion of distance education through digital means
and

(9) Implements two treaties regarding the respecting of copyright laws internationally.

The legislation has significant impact on our international status. Although technically the Senate still must ratify international pacts before governments of the world give credence to the measure, the law does prepare for the ratification and execution of two (2) treaties regarding *WIPO*, The World Intellectual Property Organization. In December 1996, over one hundred and fifty countries agreed on WIPO at a conference on digital information and copyrights in Geneva. The first treaty addresses digital authors' rights. The second pact focuses upon The Internet and sound recordings. Thirty nations must ratify the agreement for it to be effective globally.[43]

Internet service providers, software industry groups, music/movie companies heralded the DMCA, with the support of such leaders as Senator John Ashcroft of Missouri and Representatives Rick Boucher of Virginia, Scott Klug of Wisconsin and Tom Campbell of California. They were



particularly gratified with the DMCA affording protection against unscrupulous individuals who could possibly make use of the information super highway for stealing and illegally distributing goods such as software, course materials, websites, etc.

Many applauded the efforts of Congress and the President. Attorney Jonathan Band, a partner in the Washington, D.C. office of San Francisco's Morrison & Forester, L.L.P, practices copyright law. He states:

> The Digital Millennium Copyright Act accomplishes four things... *First*, it implements the World Intellectual Property Organization treaties, thus harmonizing U.S. copyright law with international law. *Second*, the DMCA establishes "safe harbors" for online service providers who unknowingly transmit copyrighted works. *Third*, the act permits the copying of software

during computer maintenance. *Finally*, the DMCA facilitates Internet broadcasting.[44]

However, members of the academic and research communities have mixed feelings about the measure. Some claim the DMCA would hinder concepts of fair use and other acceptable means of validly utilizing copyrighted materials. Concerns regarding educational use continue as a result. There are those who also cite the measure stifles operation, free thought, expression, system corrections, etc. Most library organizations oppose the measure, stating it does not contain many desired provisions. Specifically, according to Professor Bob Oakley, Library Director of the Georgetown University Law Center, H.R. 2281 is a hindrance to reading, browsing, classroom teaching and application of fair use standards. He claims, "HR 2281, as drafted, would grant copyright owners a new and unrestricted exclusive right to control access to information in digital works which could negate one of the most basic principles...the ability to gain access information in published or publicly available works...."[45]

Among the groups that communicated concerns about the legislation to Congress were:

The American Association for the Advancement of Science
The American Association of Law Libraries,
The American Association of Legal Publishers
The American Historical Association
The American Library Association
The Digital Future Coalition (DFC)
The Medical Library Association
The Music Library Association
The National Education Association
The National Humanities Alliance
The Association of Research Libraries.[46]



For example, among the changes for libraries, Section 108 of The DMCA now allows libraries to make up to three digital archival copies of published and unpublished materials for storage and retrieval. Previously one copy was allowed. However, The DMCA does not provide that these digital copies be made accessible to the public away from library grounds. The copy sent must arrive in analog form. And, any copyright notice originally on a work should be included on the copy. If not, the library must give a legend stating that the work is possibly protected by copyright law.

Perhaps the ideas of many are expressed by The Digital Future Coalition (DFC). The DFC is a forty-two-member organization comprised of non-profit and for-profit entities interested in intellectual property law in the digital era. According to Peter Jaszi, "This legislation is a substantial victory for both the creators and consumers of intellectual property because it

provides meaningful protection while recognizing the traditional balance between owners' rights and the privileges of legitimate users."[47]

**3. The New Millennium Institutional Service Provider**

The DMCA clearly does not mandate universities and colleges to become commercial Internet Service Providers (ISP's) or Online Service Providers (OSP's). But, liability may result if institutions allow impropriety over their computer systems. It may very well be advisable to register an agent with The Copyright Office for the receipt of claims regarding potential copyright infringement. Among the schools that have done so are Northeast State Technical Community College in Blountville, Tennessee, The University of Nebraska in Lincoln, Nebraska, UCLA in Los Angeles, California and The University of Chicago in Illinois. Other facilities are quickly following suit.

The College of West Virginia has instituted policies specifically covering the Internet and e-mail. They deal with a variety of issues, including but not limited to, software, media services, e-mail usage/transmissions, passwords and privacy. They are designed to inform those utilizing the facilities of potential problems and liabilities that may result from improper usage. The CWV policies include internal investigations, record keeping and the promotion of the college's mission and internal procedures. But some institutions lack proper, effective policies. Colleges and universities need to develop or update procedures for the handling of potential infringement. A major emphasis of these directives should be to have policies clearly stated online as well as around campus. Swift action is necessary for those repeat offenders who abuse the system at the school's expense. A termination of their Internet accounts or other appropriate punitive measures are absolutely crucial. Experienced professionals should effectively carry out implemented policies and notify proper authorities of any mishaps immediately. Most importantly colleges and universities need to institute programs for the understanding and education of all involved in the process.

Again it is extremely difficult to address specific concerns since The DMCA only provides that The Copyright Office consult with affected parties and make recommendations to Congress on how to promote distance education through digital technologies. Among the things that Congress desires in its report are:



- The need for exemptions,
- Categories of works which would be included in an exception,
- Appropriate limitations on portions of works that may be used under any exemptions adopted,
- The parties eligible under exemptions,
- The extent to which use of technological protection measures should be mandated as a condition of eligibility for any exemption,
- The extent to which the availability of licenses should be considered in assessing the eligibility of any exemption, and
- Other appropriate issues.[48]

At the time this work was being completed Congress had just received the final report from The United State Copyright Office.[49]

**4. Criminal Consequences and Liability in the Digital Age**

Plaintiffs recovering successfully for wrongdoing under The DMCA have the choice of illegally obtained profits, statutory damages or injunctive relief. But, the most alarming fact is that copyright infringers can go to jail for violations. According to The Software Publishers Association, copyright piracy costs over eighteen billion dollars worldwide.[50] The DMCA is filled with penalties as well as liabilities for those tempted to go astray.

In general, The DMCA's Sections 1203 and 1204 impose updated standards and gives guidance for works on The Net especially regarding criminality. It will be unlawful to create or sell any technology used to break copyright protection devices. Illegal circumvention, i.e. those acts that constitute piracy of another's work, will carry statutory damages of twenty-five hundred dollars.[51] And, those committing illegal acts in a willful and purposeful manner will result in serious criminal penalties of several hundred thousand for each violation.[52]

Section 1204 provides for violations regarding circumvention of copyright protection systems. Anyone who violates either section for "purposes of commercial advantage or private financial gain" faces up to five hundred thousand dollars in fines or imprisonment of up to five years, or both, for the first offense. The penalty is up to one million dollars and up to ten years, or both, for subsequent offenses.[53] Courts will have the power to award triple damages against repeat offenders. A five-year statute of limitations applies here.[54]

Meantime, acts of illegality regarding the manufacture and distribution of circumvention devices have immediate consequences for perpetrators.[55] The DMCA is weak as to the outlawing of tampering or interfering with safeguards in technology. It focuses more upon copyright management information issues. The DMCA makes it illegal to "manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device, component or part thereof "[56] that may be used to circumvent a technological protection measure. In other words, any device utilized to thwart copyright protections is illegal. Burglary tools like the infamous black



boxes are especially of concern in this regard. The DMCA also bars "the act of breaking through encryption and similar technologies"[57] in order to gain access to copyrighted materials. However, the new law affords protection for the promotion of legally sound endeavors such as encryption research, security testing, law enforcement needs, reverse engineering and so on.[58] Finally, devices to detect and prohibit child pornography on the Internet were given exemption.

## IV. CONCLUSION

This article addresses basic copyright law as well as delves into the administration's latest measure. It details several issues vital to educators in the new, digital millennium. However our study has only just begun. There are several bills still on Congress's agenda. The DMCA is composed of complex rules and regulations and will face heavy testing in courts around the nation. It is too early to tell how these battles will affect educators. Perhaps amendments or further statutory interpretations will be necessary by the federal legislature in order to alleviate these concerns. Among the problems is that the fair use provision, as applicable to the electronic age, is not clearly understandable within the new law.

However, if educators are to advance in the digital age, they must cut a compromise between right and rule, between freethinking and structured regulation. It will be a test of time as to whether or not the Clinton administration's efforts will be a cure or a curse for the new millenium in copyright. The only way to examine The DMCA's validity is by trial and error. Unfortunately all of us involved with copyright may be cursed with many of each.



# APPENDIX A

- **Indiana University-Purdue University Indianapolis** and **Indiana University**, The Copyright Management Center, (accessed Jan. 7, 1999) <http://www.iupui.edu/~copyinfo>. The Center serves both institutions. It has everything from fair use to distance education to library issues and special media issues. Indiana University offers policies as well as sample forms for faculty regarding distance learning and research considerations in general. *See,*

e.g., <http://www.indiana.edu/~ufc/circulars/97-98/U16-98.htm> as well as <http://www.iupui.edu/~copyinfo/raagreemt.html> and <http://iupui.edu/~copyinfo/dlagreemt.html>.

- **The University of Texas**, "Guidelines for Classroom Copyrighting of Books and Periodicals," adapted from the Association of American Publishers and The Author's League of America, (accessed Jan. 7, 1999) <http://www.utsystems.edu/OGC/IntellectualProperty/clasguid.htm>.
  The University System also has wonderful copyright presentations via the web. The address is
  <http://www.utsystems.edu/ogc/intellectualproperty/present.htm>.

  Check out "Copyright Law in Cyberspace" at the above site with */nacua.htm* finishing the web address after the *intellectualproperty*. Be sure to visit the copyright management information site at the preceding address, ending in *copymgt.htm* (accessed 10/98). Finally, for the beginner, UT has a great site called "Crash Course in Copyright" (accessed Jan. 8, 1999) <http://www.utsystem.edu/OGC/intellectualproperty/cprtindx.htm>.

- **The University of Minnesota** (dated 1995) (accessed Jan. 7, 1999) <http://arl.cni.org/scomm/copyright/Minnesota.html>.

- **Rensselaer Polytechnic Institute**, Library Policies, (accessed Jan. 9, 1999) <http://www.rpi.edu/dept/library/Policies/fairuse.html>.

- **Brigham Young University** (dated 1994) (accessed Jan. 7, 1999) <http://www.byu.edu/~ttdata/intell.html>.
  (It must be downloaded as an MS Word file in order to be read).

- **Massachusetts Institute of Technology** (dated 1995) (accessed Jan. 14, 1999) <http://web.mit.edu/policies/13.1.html>.
  MIT also has a good site regarding frequently asked questions on copyright (accessed Jan. 14, 1999) <http://web.mit/cwis/copyright/faq.html>.



- **North Carolina State University** (dated 1993) (accessed Jan. 11, 1999) <http://www.lib.ncsu.edu/issues/TRLN_mod_copyrt_pol.html>.

- **Columbia University**, "The Educator's Copyright Survival Guide," (accessed Jan. 10, 1999) <http://www.ilt.columbia.edu/projects/copyright/ILTcopy3.html>.
  This site is referred to as CREDO, "Copyright Resources for Education Online."

- **The University of California,** "Copyright Considerations for Faculty-Authored Multimedia Instructional Materials", (dated 1996) (accessed Jan. 10, 1999) <http://mody.ucdavis.edu/Distance-ed/Copyright.htm>.

- **Stanford University** (accessed Jan. 10, 1999) <http://www-portfolio.stanford.edu/101242>. Stanford also has guidelines for the educator at <http://www-sul.stanford.edu/cpyright.html>, as well as the librarian at <http://fairuse.stanford.edu/library >.

- **Yale University** (accessed Jan. 10, 1999) <http://www.library.yale.edu/~okerson/copyproj.html>. " Copyright Resources Online" is a fantastic summary for anyone interested in these and related issues.

- **The University of Tennessee** (dated 1994) (accessed Jan. 19, 1999) <http://toltec.lib.utk.edu/~gco/patcoc.html>.

- **The University of Canada at Alberta,** "Copying Right", (dated 1994) (accessed Feb. 11, 1999) <http://libits.library.ualberta.ca/library_html/copyright/copy_right.html>.

- **The University of Chicago**, "Policy Guidelines for Publishing Networked Information," (dated August 1994) <http://www.uchicago.edu/uofc/campus/policies/publishing-policy.html>.



Endnotes

*Dr. Robert N. Diotalevi is Director of Legal Studies and Associate Professor at The College of West Virginia. He has been a lawyer for fourteen years. He possesses four (4) degrees and has been internationally published. He serves as an editor on *The Online Journal of Distance Learning Administration*. He has developed two web-based courses, The Law of

Cyberspace and Copyright Law. Dr. Diotalevi is co-authoring a book entitled, "The ETD's Sourcebook: Theses and Dissertations in the Electronic Age." Scarecrow Press will publish this year.

[1]. *See* ACLU v. Reno, 929 F. Supp.824 (E.D. Pa. 1996); It is worth mentioning that many legal courses concerning The Internet are being offered. *See, e.g., Internet Law* at Seattle University School of Law, *Cyberlaw* at The University of California, (Berkley). *A Law of Cyberspace?* at John Marshall Law School, *Law and the Internet* at Carleton University, *Cyberspace Law 1997* at Lewis and Clark College and *Law and Internet Seminar* at The University of Miami School of Law.

[2]. *See* Brad Templeton, 10 Big Myths about Copyright Explained, (accessed Feb.17, 1999) <http://www.clari.net/brad/copymyths.html>;*see also* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, at 50-51 (1994) <http://www.msen.com/~litman/read.htm>.

[3]. *Id.*

[4]. *See, e.g.*, Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace; Why Copyright Law Could be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 1 (Spring,1997); Kenneth D. Crews, *Copyright Law, Libraries and Universities: Working Paper*, (accessed Feb.17, 1999) at <http://palimpsest.stanford.edu/bytopic/intprop/crews.html>; *Copyright Basics*, available from the U.S. Government (accessed Feb.17, 1999) <http://lcweb.loc/gov/copyright/cirs/circ01.html>.

[5]. 17 U.S.C. § 101 et seq.(1994).



[6]. *See, generally*, 17 U.S.C. § 106 (1994), as well <http://lcweb.loc.gov/copyright/circs01.html>.

[7]. This work will not address foreign jurisdictional matters apart from the Berne Convention discussed *infra*.

[8]. *See* 17 U.S.C.A § 102(a) (1996), as well as Feist Publications, Inc. v. Rural Tel. Ser. Co., 499 U.S. 340, 349-50 (1991). In *Feist*, the U.S. Supreme Court explained that the primary objective of copyright law is "not to reward the labor of authors, but (t)o promote the Progress of Science and useful Arts...." *id.* at 349-50. The case involved the

determination of lack of originality in printed, white phone directory pages. (accessed Feb.1, 1999) <http://www.seamless.com/rcl/feist.html>; *see also Benjamin B. Thorner, Copyright Protection For Computer Databases: The Threat of Feist and a Proposed Solution*, 1 VA. J.L. & TECH. 5 (Spring, 1997) at <http://scs.student.virginia.edu/~vjolt/graphics/vol1/home_art5.html>.

[9]. *See* 17 U.S.C.A. § 102(a) (West 1996); For a more complete discussion, *see* The U.S. Copyright Website (accessed Jan. 1,1999) <http://lcweb.loc.gov/copyright/circs/circ01.html>. Several works that do not enjoy such afforded protection include titles, names, slogans, symbols, designs, lettering, coloring, improvisational speeches, unrecorded performances, concepts, devices, systems, methods, calendars, etc. Many times other legal protections such as trademark, trade name, patent and the like come into play. *Id. See also* Mark F. Radcliffe, *The Law of Cyberspace for Non-Lawyers*, The Cyberspace Law Primer, (October 1996) <http://www.gcwf.com/articles/primer.htm>.

[10]. 17 U.S.C.A. § 101 (1996).

[11]. *See, e.g.*, Radcliffe, *supra* at 10-11; *see also* III. *infra*.

[12]. *Id. see also* 17 U.S.C.A. § 301.

[13]. Congress is grappling over bills based on the White Paper. *See* United States Department of Commerce, Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property* 10-11 (1995) (known as the White Paper). One can obtain the final report by writing to the Office of Legislative and International Affairs, U.S. Patent and Trademark Office, Box 4,



Washington, D.C. 20231, or <http://www.uspto.gov/web/offices/com/doc/ipnii>. For an analysis of the White Paper, *see* Kathi A. Cover, *The Emperor's Magic Suit: Proposed Legislation Will Tailor the Copyright Law to Fit the Internet* (accessed Jan.17, 1999) <http://www.smu.edu/~csr/win96a2.htm>.

[14]. *See* 17 U.S.C. §§ 408 and 409. The United States Copyright Office contact information is as follows:

Phone: 202-707-3000 (person)
Phone: 202-707-9100 (publications)
Fax: 202-707-2600

Web: <http://lcweb.loc.gov/copyright>
There is a method to obtain copyright office materials via e-mail. Simply send a message to "LISTSERV@RS8.loc.gov" in order to subscribe to the *Newsnet* Issue services (put in the body of the message "Subscribe USCopyright"). *see also* Thomas G. Field, *Copyright For Computer Authors*, Franklin Pierce Law Center (accessed Jan. 20, 1999) <http://www.fplc.edu/tfield/copySof.htm>.

[15]. 17 U.S.C. § 302; *see also* 17 U.S.C. § 2589. If the work is *for hire*, that is, it is done in the course of employment or has been commissioned the copyright lasts between 95 and 120 years, depending on the date of publication. Publication includes sales, leasing, freely giving away, public distribution, etc.

[16]. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified in 17 U.S.C.A. § 101 (West 1996)).

[17]. 17 U.S.C. § 107 (1992).

[18]. 510 U.S. 569 (1994).

[19]. *Id* (emphasis added). *see also* Circular 21, *Reproduction of Copyrighted Works by Educators and Librarians*, U.S. Government Printing Office, Washington, D.C., 1995 at page 8.

[20]. 510 U.S. 569, 114 S. Ct. 1164(1994) at 1174-1179.
The Court corrects two common lower courts errors. One was to treat the market effect factor as being the most important factor. The other error was to give copyrighted works class treatment by holding, for example, that since the copying of material from one book is infringement, copying from all books is infringement. The Court stressed that simple piracy is to be distinguished from those raising reasonable contentions of fair use. *id*. at 578 n. 10.



A comparison of the two songs appears below as cited in the case's appendices:

**Appendix A**

"Oh, Pretty Woman" by Roy Orbison and William Dees
Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you,
you're not the truth,
No one could look as good as you
Mercy
Pretty Woman, won't you pardon me,
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me?

Pretty Woman, stop a while,
Pretty Woman, talk a while,
Pretty Woman give your smile to me
Pretty woman, yeah, yeah, yeah
Pretty Woman, look my way,
Pretty Woman, say you'll stay with me
'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight
Pretty Woman, don't walk on by,
Pretty Woman, don't make me cry,
Pretty Woman, don't walk away,
Hey, O. K.
If that's the way it must be, O. K.
I guess I'll go on home, it's late
There'll be tomorrow night, but wait!
What do I see
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman.

**Appendix B**

**"Pretty Woman" as Recorded by 2 Live Crew**

Pretty woman walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman
Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit
'Cause you look like 'Cousin It'
Big hairy woman



Bald headed woman girl your hair won't grow
Bald headed woman you got a teeny weeny afro
Bald headed woman you know your hair could look nice
Bald headed woman first you got to roll it with rice
Bald headed woman here, let me get this hunk of bur for ya
Ya know what I'm saying you look better than rice a roni
Oh bald headed woman
Big hairy woman come on in
And don't forget your bald headed friend
Hey pretty woman let the boys
Jump in
Two timin' woman girl you know you ain't right
Two timin' woman you's out with my boy last night
Two timin' woman that takes a load off my mind

Two timin' woman now I know the baby ain't mine
Oh, two timin' woman
Oh pretty woman

---

*See* <http://supct.law.cornell.edu/supct/html/92-1292.ZO.html>; Compare Basic Books, Inc. v. Kinko's GraphicsCorp., 758 F. Supp. 1522 (S.D. N.Y. 1991) with American Geophysical Union v. Texaco, Inc., 60 F. 3d 913 (2d Cir.1994). (These latter two cases are from the same federal district court with differing results regarding photocopying for education and personal use); *see also* June M. Besek, *The Evolving Law of Copyright and the Internet: Recent Developments in Fair Use Under the Copyright Act*, (accessed Dec. 1,1998) <http://cla.org/matsnpubs/memberarticles/evolve.htm> as well as Kenneth D. Crews, *Copyright and Distance Education: Lawful Uses of Protected Works* (accessed Nov. 16, 1998) <http://www.ihets.org/distance_ed/ipse/fdhandbook/copyrt.html>.

[21]. *See* Besek, *supra*. For a copy of CONFU's draft report, *see* <http://uspto.gov/web/offices/dcom/olia/confu/report.htm>.

[22]. 785 F. Supp. 1522 (S.D.N.Y. 1991).

[23]. 99 F. 3d 1381 (6th Cir. 1996).

[24]. *Id.* at 1393. *See also* American Geophysical Union v. Texaco, *supra* note 20. (photocopying by a for-profit corporation's lab scientist Chickering did not constitute fair use. The Court stated, "(o)ur opinion does not decide the case that would arise if Chickering were a professor or an independent scientist engaged in copying and creating files for independent research." *id.* at 916.



[25]. *See* <http://www.utsystems.edu/OGC/intellectualproperty/distguid.htm at 1.3.>.

[26]. For a list of institutions, check John Marshall University Law School, <http://www.jmls.edu/cyber/others.html> (accessed May 1, 1999) and Yale University <http://library.yale.edu/%7Eokerson/copyproj.html> (accessed May 2, 1999). For the publication "Guidelines for Creating a Policy for Copyright Compliance, contact Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923, phone: 781-239-0057, or at <http://www.copyright.com>.

[27]. Note that The White Paper indicates browsing is an infringement. *supra* note 13,at p. 64-65, n.2. For the complete

text of Section 110, *see* <http://www.loc.gov/copyright/title17/chapter1.pdf>.

[28]. 907 F. Supp.1361 (N.D. Cal. 1995) and 923 F. Supp. 1231 (N.D. Cal. 1995). The court granted in part and denied in part the plaintiffs' motion for a preliminary injunction against Erlich. 923 F. Supp. At 1231. In the opinion at 907 F. Supp. 1361 the court granted in part and denied in part NetCom's and Klemesrud's motions for summary judgment as well as judgment on the pleadings and denied plaintiffs' motion for a preliminary injunction. *id.* at 1374.

[29]. 839 F. Supp. 1552 (M.D. Fla. 1993).

[30]. 907 F. Supp. At 1372-73.

[31]. *Id.* 1377.

[32]. *Id.* at 1369.

[33]. *Id.* at 1374-75.

[34]. *Id.* at 1375; *see also* <http://www.jmls.edu/cyber/cases/netcom.txt> and, in general, David L.Hayes, *Application of Copyright Rights to Specific Acts on the Internet*, 15 NO. 8 Computer Law 1 (August, 1998) as well as Besek, *supra* note 20, and Eugene A. Burcher & Anna M. Hughes, Casenote, Religious Tech. Ctr. v. Netcom On-Line Communications, Inc.: *Internet Service Providers: The Knowledge Standard for Contributory Copyright Infringement and The Fair Use Defense*, 3 RICH. J.L. TECH. 5 (1997) <http://www.richmond.edu/jolt/v3i1/burhugh.html>.

[35]. 17 U.S.C. §§ 504-506. S*ee also* U.S.C. Title 18 § 2319(b) for federal criminal consequences and Circular 21, *supra* note 17, at p. 26. These penalties have been revised with the passage of The Digital Millennium Copyright Act, *infra*.



[36]. *See* Bruce G. Joseph & David A. Vogel, *Copyright Protection of Software and Compilations: A Review of Critical Developments*, Advanced Seminar on Copyright Law, 441 PLI/PAT, (May 19,1996) at 382.

[37]. *See* ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447, 1449 (7th Cir.1996)(case involves the validity of shrinkwrap licenses, agreements by buyers to accept the terms by opening package wrapping). For an in-depth analysis *see* Jennifer L. Hawkins, *ProCD v. Zeidenberg: Enforceability of Shrinkwrap Licenses Under the Copyright Act*, 3 RICH. J.L. & TECH. 6 (1997) <http://www.richmond.edu~jolt/v3i1/hawkins.html>.

[38]. *See, e.g.*, The Copyright WebSite (accessed Feb.12 1999) <http://www.benedict.com/webiss.htm> as well as <http://www.patents.com/weblaw.sht>.

[39]. H.R. 2281 in the House of Representatives, and S. 2037 in the Senate (S. 1121, abandoned with the passage of this legislation).

[40]. <http://lcweb.loc.gov/copyright/legislation/hr2281.pdf> (accessed Feb.1, 1999), <http://lcweb.loc.gov/copyright/legislation/dmca.pdf> (accessed Feb.1, 1999), and <http://lcweb.loc.gov/copyright/disted/> (accessed Feb.1, 1999).
For a comprehensive analysis, *see The Digital Millennium Copyright Act*, by Mark Radcliffe
at <http://www.gcwf.com/articles/interest/interest11.html> as well as
The Digital Future Coalition website (accessed Dec. 31, 1998) <http://www.dfc.org>.

[41]. *Statement by the President*, Office of the President's Press Secretary, The White House (October 12,1998) <ftp://ftp.aimnet.com/pub/users/carroll/law/copyright/h2281-res.txt>.

[42]. Now Public Law No: 105-304. *See, e.g.*, <http://thomas.loc.gov> as well as <http://www.dfc.org/issues/graphic/2281/2281.html>(accessed Feb.6, 1999)
For a better understanding, *see* The Software Publishers Association, (accessed Feb.7, 1999) <http://www.spa.org/govmnt/iprt/dmcasumdraft.htm>.

[43]. *See, e.g., New Global Treaties Protect Copyrights Online*, by Ralph Oman, Law Journal Extra, (accessed Feb.17, 1999) <http://www.ljx.com/copyright/p4global.html>.

[44]. *Lawyers and Technology: The Sound of One Computer Copy*, by Wendy Liebowitz, Law Journal Extra, (citing The National Law Journal), p. A16, (November 2, 1998) (*emphasis added*) <http://www.ljx.com/news/dime.htm>.

[45]. *American Library Association News and Views* (June 10, 1998) <http://www.ala.org/news/copyright.html>.



[46]. *Press release*, Association of Research Libraries, Washington, DC, (Sept. 29,1998) <http://arl.cni.org>.

[47]. Digital Future Coalition, (accessed October 16, 1998) <http://ari.net/dfc/issues/wipo/pr101698/pr101698.html>.

[48]. The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary (accessed May 13, 1999) <http://lcweb.loc.gov/copyright/legislation/dmca.pdf>.

[49]. *See* Report on Copyright and Digital Distance Education, U.S. Copyright Office, May 26,1999, <http://lcweb.loc.gov/copyright/disted>.

The Report advises that §110(2) be updated. *id.*at xv. Also, the report recommends clarification regarding the term "transmission," that should apply to digital as well as analog. *id.* at 146. Regarding fair use, the report claims that it is "technology-neutral" and must be defined in explicit language in order avoid further confusion. *id* at xxii and 162. Thus, if Congress approves the recommendations, the law would let professors teaching classes over the Web at nonprofit institutions show movie clips or play parts of musical recordings. *See, in general, id.* at 154-159; *see also* U.S. Copyright Proposal Supports Distance Learning, by Pamela Mendels, *New York Times*, May 29, 1999 and Copyright Office Releases Proposal for On-Line Distance Education, by Kelly McCollum, *The Chronicle of Higher Education*, Vol. XLV, No. 41, June 18, 1999.

[50]. <http://www.spa.org/govmnt/iprt/wipotalk.htm>. Regarding damages, on May 11,1999 Representative James Rogan of California introduced *The Copyright Damages Improvement Act of 1999*, H.R.1761. Representative Howard Coble of North Carolina, Chairman of the House Intellectual Property Subcommittee, to which the bill was referred, is cosponsoring it. The measure would increase the statutory awards available to copyright owners whose works are infringed. It would also add a new tier of damages that targets parties that have engaged in a "repeated pattern or practice of infringement." Finally, the bill contains language to prevent offenders from declaring bankruptcy to avoid paying a copyright infringement judgment against them. <http://thomas.loc.gov/cgi-bin/query/C?c106:./temp/~c106DDXM97>; US COPYRIGHT OFFICE NEWSNET ISSUE 47,U.S.Copyright Office NewsNet, May 18, 1999.

[51]. *See, e.g., Digital copyright bill becomes law*, by Courtney Macavinta, CNET NEWS.com, (October 28, 1998) <http://www.news.com/News/Item/0,4,28060,00.html?owv> .

[52]. *Id.*

[53]. 17 U.S.C. §§ 1204 a & b.

[54]. *Id* at § 1204 (c). *See, e.g.*, <http://spa.org/govmnt/iprt/wipotalk.htm>.

28

[55]. 17 U.S.C. §1201(b).

[56]. *Id.* at § 1201(a).

[57]. Discussion Draft on Copyright Considerations for Faculty Authored Multimedia Course Materials, The University of California Committee on Intercampus Information Technology and Networking for Academic Purposes (CINITAP), 1996 (accessed May 16, 1999) <http://www.ucop.edu/irc/wp/wp_Docs/wpd002.html>.

[58]. *Id. see also* Jonathan Band, The Digital Millennium Copyright Act, (accessed Dec. 1, 1999) <http://www.dfc.org/issues/wipo/graphic/2281/JB-index/jb-index.html>.